CASE NOTES

GOODFELLOW v. FEDERAL COMMISSIONER OF TAXATION[1]

Income tax — Exempt income — Invalidity benefit payments made to ex-naval officer — Whether payments of a similar nature to those specified in s. 380(2) of the Income Tax Act 1952 (U.K.) — Income Tax Assessment Act 1936-1972 — Former ss. 23(k), 23(kaa), 23(kab).

The decision of the Full High Court of Australia in this case will be of particular interest to many readers of the Federal Law Review because of their association with the appellant during his time as a student at the Law School of the Australian National University.

The judgment does not by any means represent one of the more important recent pronouncements of the High Court on Australian income tax law but it is notable principally for two reasons. It reflects the results that may be achieved if a taxpayer who is convinced of his case under the terms of the Income Tax Assessment Act 1936 (hereafter referred to as "the Assessment Act") presses his claim to the fullest extent possible under the objections and appeals provisions of Part V of that Act. It is also another reminder of the strict legalistic attitude of the High Court to the interpretation of taxation statutes.

The appellant in the action was a former member of the Defence Forces, Lieutenant Commander Fred Goodfellow, who was badly injured at the Naval Base at Nowra, New South Wales, in 1969, while flying an aircraft in the course of (peace-time) duty in the Royal Australian Navy Fleet Air Arm. He was left a paraplegic as the result of the accident and was discharged from the Navy as physically unfit for further service. Having been a contributor to the Defence Forces Retirement Benefits Fund during his service with the Defence Force, and being retired because of a 60 per cent or more incapacity for civilian employment, he was awarded a full rate (Class A) invalid pension under the D.F.R.B. scheme.

It is, of course, firmly established that a pension or like payment comes within the ordinary concept of income and is assessable income under the Assessment Act except where a specific provision of the Act provides otherwise. The issue before the High Court, therefore, was whether particular provisions of the Act—section 23(kaa) or section 23(kab)—operated to exempt from income tax the D.F.R.B. pension derived by Goodfellow. So far as is relevant, section 23(kaa) provided exemption for payments which, in the opinion of the Commissioner of Taxation, were "of a similar nature" to pensions specified in section 23(k) of the Assessment Act (these pensions included disability pensions payable under Commonwealth repatriation legislation), while section 23(kab) provided exemption for wounds and disability pensions

[1] (1977) 13 A.L.R. 203; 77 A.T.C. 4086. High Court of Australia; Barwick C.J., Jacobs and Aickin JJ.

"of the kinds" specified in certain legislation of the United Kingdom. The relevant provisions of the Assessment Act, as they stood in the years concerned,[2] exempted from tax:

> (k) pensions and attendants' allowances paid, and payments of a like nature made, under the *Repatriation Act* 1920-1962, the *Repatriation (Far East Strategic Reserve) Act* 1956-1962, the *Repatriation (Special Overseas Service) Act* 1962 or the *Seaman's War Pensions and Allowances Act* 1940-1961;
> (kaa) pensions and allowances paid, and payments made, by the Commonwealth or by the Government of the United Kingdom, being pensions, allowances or payments which, in the opinion of the Commissioner, are of a similar nature to pensions, allowances or payments specified in the last preceding paragraph;
> (kab) wounds and disability pensions of the kinds specified in sub-section (2) of section three hundred and eighty of the *Imperial Act* known as the *Income Tax Act*, 1952; . . . .

The matter reached the Full High Court, pursuant to the provisions of Part V of the Assessment Act, by way of an appeal lodged by Goodfellow against an order by Sheppard J. of the Supreme Court of New South Wales on questions of law referred to him by a Taxation Board of Review. Income Tax assessments in which the D.F.R.B. pension received by Goodfellow had been treated as assessable income had been referred to the Board of Review for review, as authorised by Part V, following the disallowance by the Commissioner of valid objections lodged under that Part by Goodfellow in respect of those assessments.

The members of the High Court—Barwick C.J., Jacobs J. and Aickin J.—were unanimous in finding that the appellant's pension was exempt under section 23(kaa). Jacobs J. also found that the pension was exempt under section 23(kab), but the other members of the Bench declined to comment on the position of the pension for the purposes of that section, on the basis that it was unnecessary for them to do so. The main judgment, with which Barwick C.J. concurred, was given by Aickin J. This judgment and that given by Jacobs J. cover several points, but the following comments in this case note concentrate on their Honours' findings in relation to the meaning of the expression in section 23(kaa) "payments which, in the opinion of the Commissioner, are of a similar nature [to the payments specified in section 23(k)]".

The interpretation of an expression of this nature must, of course, be one of fact and degree. It is, of course, obvious that, to determine whether something is or is not similar to another thing, it is first necessary to examine the characteristics of each. However, there remains the question which of those characteristics have to be common to both things for one to be regarded as similar to the other, and it is in this respect that their Honours reached a different conclusion from that of Sheppard J. of the Supreme Court of New South Wales.

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[2] Ss. 23(k), 23(kaa) and 23(kab) were omitted in 1973 and re-enacted, in effect, as s. 23AD(3)(a), (b) and (c): Act No. 165 of 1973 ss. 4(1) and 5(1).

Aickin J. was careful to emphasise that section 23(kaa) is not concerned with identity but with similarity. He then proceeded to trace the history of the Repatriation Acts and the Defence Forces Retirement Benefits Act, concluding that the former Acts provided pensions for members of the Defence Forces incapacitated during service in time of war or warlike operations, while the latter Act provides pensions for members of the Defence Forces incapacitated during service in time of peace. He found that in neither case is there any causal connection between the service and the occurrence giving rise to the incapacity, and that in each case the amount of the pension is related to the degree of incapacity. On the basis of this comparison, his Honour concluded that the finding of Sheppard J., that some causal connection with war service was essential to similarity, was misconceived. He said:

> I do not regard the difference between wartime and peacetime service as significant for present purposes because the history of the Repatriation Act demonstrates a consistent policy of extending its operation to wartime service as it arises from time to time. No doubt that policy could change in the future but it is nonetheless relevant to ascertaining the intention of the Parliament in what is now s 23(kaa). However, provision of pensions under the successive Repatriation Acts to members of the Forces in respect of an incapacity arising out of occurrences during service in all the periods of time when the Commonwealth has been engaged in war or in hostile warlike operations provides a positive indication that, those Acts having covered that field, similarity in nature cannot require that the pensions or allowances must arise out of or during wartime service.[3]

Aickin J. took the view that the features common to pensions payable under the respective Acts (the main one being, it appears, that they are both paid due to incapacity arising while a person is serving with the Defence Forces) were more significant in relation to the test of similarity than the differences between the pensions concerned. Having dismissed as "not sufficient in character or extent to negate similarity"[4] the difference arising from the fact that a D.F.R.B. pension is paid out of a Fund to which members of the Defence Force contribute whereas Repatriation pensions are not, he went on to say:

> The other differences to which I have referred above are not, in my opinion, significant, and cannot in combination with the principal differences relied on be regarded as leading to the conclusion that the pension now in question is not of a similar nature to those referred to in par (k). On the other hand the common features and those which demonstrate only minor procedural differences are of a substantial character and do demonstrate the similarity of the nature of this pension to those with which comparison is required. When all the features of the two pensions are looked at together, they demonstrate to me a

[3] (1977) 13 A.L.R. 203, 216; 77 A.T.C. 4086, 4095.
[4] *Ibid.*

> degree of similarity such that I do not regard as open to the Commissioner a conclusion that they are not of a similar nature within the meaning of par (kaa).[5]

Jacobs J. emphasised that the comparison which must be made is between the nature of the particular pension being considered under section 23(kaa) and the nature of the pensions specified in section 23(k). However, his position on the issue was essentially the same as that of Aickin J. His finding that Goodfellow's pension was similar in nature to the pensions specified in section 23(k) appears to be based on rejection of the notion that an essential characteristic for a finding of similarity must be that the pension be paid on account of disability arising during service in times of war or warlike operations.

He said:

> Incapacity for further service, however it arises, is the event which founds the right to pension. The nature of the pension is one received on account of that incapacity. The existence of the wars or warlike operations with which the various statutes deal provides no more than the temporal occasion of service with which the various statutes deal. Sections 51 and 52 of the Defence Forces Retirement Benefits Act provide their own temporal occasions, but the nature of a pension received under those sections is similar to the nature of the pensions provided for in the various statutes stated in par (k).[6]

Given the strict attitude of the courts to the interpretation of taxation statutes, the decision by the High Court in *Goodfellow's* case appears, with respect, to be one that was perfectly open for it to reach. Viewed in that context, one may wonder, in retrospect, why the question of the application of section 23(kaa) to a pension of the type derived by Goodfellow had not been the subject of judicial examination earlier. However, a little research into the history of section 23(kaa), and the action of the Commonwealth Government in introducing "remedial" legislation following the High Court's decision, indicates that this is another example of the established approach of the Court when dealing with a taxation statute—of finding the intention of Parliament solely from the words of the statute—giving from time to time a result contrary to what the legislature really intended.

The provision was originally inserted in the Assessment Act in 1945[7] and, so far as is presently relevant, remained in substance unaltered until its repeal in 1973. Perusal of extracts from *Hansard* throws little light on the types of pensions it was intended to cover. However, other references indicate that it was officially regarded as being designed to exempt from tax "act of grace" payments, determined by reference to the Repatriation legislation, made to part-time members of the Defence Forces and certain civilians (such as members

[5] *Id.* 216; 4095-4096.
[6] *Id.* 205; 4087.
[7] Act No. 4 of 1945, s. 4.

of the Red Cross) who are not entitled to pensions under the Repatriation legislation.[8]

Since the Repatriation legislation of 1945 provided pensions for members of the Defence Forces in respect of service in time of war or warlike operations, it would seem in these circumstances that the "act of grace" pensions concerned would be payable also in respect of disabilities suffered during such times. Be that as it may, it is clear enough that a pension payable under the D.F.R.B. scheme is not an "act of grace" payment. It is not surprising against this background that the Commonwealth Government was quick to introduce legislation —section 4 of the Income Tax Assessment Amendment Act 1977 (Act No. 57 of 1977)—to overcome the High Court decision so far as concerns future payments. This section adds to section 23AD of the Assessment Act a new sub-section (4), which renders the exemptions granted by the section inapplicable to D.F.R.B. and D.F.R.D.B. pensions, as well as to certain other payments, paid after 21 April 1977, under Commonwealth Acts. The inclusion of the reference to those other payments means that the amendment has a wider coverage than is probably necessary to nullify the effects of the High Court decision but this is apparently explained by some uncertainty surrounding the full implications of that decision.

There are, of course, precedents to the enactment of "remedial" legislation, (but without retrospective effect) following a court decision which gives a result contrary to that intended by a statutory provision, and in an announcement dated 15 April 1977 which foreshadowed the amendment of section 23AD, reference was made by the Minister Assisting the Treasurer, the Hon. Ian Viner, M.P., to the fact that the pensions affected by the Court's decision have, like other pensions paid under contributory superannuation schemes, long been regarded and accepted as subject to tax.[9]

Mr Viner indicated in his announcement that the Commissioner of Taxation accepted the High Court's decision as applying in respect of all invalid pensions under the D.F.R.B. and D.F.R.D.B. schemes, but it is interesting to note the effects of the amendment made by section 4 of Act No. 57 of 1977 and the provisions of section 170 of the Assessment Act. Section 170 sets out the conditions under which an income tax assessment may be amended. The Commissioner apparently takes the view that past assessments in which D.F.R.B. and D.F.R.D.B. invalid pensions have been included as assessable income cannot generally be re-opened to exempt those pensions in accordance with the Court's decision because of a general prohibition in section 170 against an amendment to effect a reduction in the liability of a taxpayer arising from a reason other than an error in calculation or a mistake of fact, except where a taxpayer has protected his position by lodgment of valid objections in accordance with the requirements of Part V of

[8] *Gunn's Commonwealth Income Tax Law and Practice* (3rd ed. 1951) 126, 127.

[9] Butterworths Weekly Current Taxation No. 317 of 22 April 1977.

the Assessment Act.[10] It is, however, clear that such pensions paid during the period 1 July 1976 and 21 April 1977 (for which assessments would not normally be issued until after 30 June 1977) will be treated by the Commissioner as exempt from tax, but that pensions paid after 21 April 1977 will, of course, be taxable in accordance with the amendment made by section 4 of Act No. 57 of 1977.

While, therefore, Fred Goodfellow has been rewarded for his perseverance in pursuing his case to the highest judicial authority in the land by a decision of that authority in his favour, the decision will be of limited benefit to him because of the subsequent amendments of section 23AD, and even more so, it seems, for other recipients of D.F.R.B. and D.F.R.D.B. invalidity pensions, because of the operation of section 170 of the Assessment Act.

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IN THE MARRIAGE OF McCARNEY AND McCARNEY;[1] IN THE MARRIAGE OF READ AND READ[2]

Family Law Act — Ss. 4(1)(ca), (e); 114(1), (3) — Extent of injunction power — Extent of property power — How to reconcile injunction and property power — No proceedings for principal relief afoot.
Family Law Act — Ss. 113; 118 — Application for declaration of validity — Purpose to confer jurisdiction to make property orders — No doubt as to validity of marriage.

The High Court decision in *Russell* v. *Russell; Farrelly* v. *Farrelly*[3] and the subsequent Family Law Amendment Act 1976 appeared to render unsuccessful the Commonwealth Parliament's attempt to give to courts exercising federal jurisdiction the power to deal with the property rights of the parties to a marriage before the institution of proceedings for principal relief.[4] This power was given to courts administering the Family Law Act 1975 by paragraph (c)(ii) of the definition of "matrimonial cause" in section 4(1); the paragraph which replaced this under the Family Law Amendment Act 1976, paragraph (ca), limits the jurisdiction of the courts to proceedings between the parties to a marriage with respect to the property of either or both of the parties ancillary to concurrent, completed or pending proceedings

[10] Income Tax Assessment Act 1936, s. 170(4), (7).

* LL.B. (A.N.U.), A.A.S.A.

[1] (1977) FLC 90-200. Family Court of Australia; Asche, Marshall S.JJ. and Joske J.

[2] (1977) FLC 90-201; (1977) 2 Fam LR 11,596. Family Court of Australia; Watson S.J.

[3] (1976) 9 A.L.R. 103.

[4] Namely, a decree of dissolution or nullity of marriage, or a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage (Family Law Act 1975, s. 4(1)).